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1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
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4 IRVING H. PICARD, TRUSTEE FOR THE
5 LIQUIDATION OF BERNARD L. MADOFF
6 INVESTMENT SECURITIES LLC AND
7 BERNARD L. MADOFF,
8 v.

CASE NO. 10-04363-smb

9 SCHIFF FAMILY HOLDINGS NEVADA
10 LIMITED PARTNERSHIP AND SCHIFF
11 FAMILY HOLDINGS, NEVADA, INC.,
12 IN ITS CAPACITY AS GENERAL PARTNER
13 OF SCHIFF FAMILY HOLDINGS NEVADA
14 LIMITED PARTNERSHIP
15 - - - - - x

16 IRVING H. PICARD, TRUSTEE FOR THE
17 LIQUIDATION OF BERNARD L. MADOFF
18 INVESTMENT SECURITIES LLC AND
19 BERNARD L. MADOFF,

20 v. CASE NO. 10-04718-smb

21 THE JORDAN H. KART REVOCABLE
22 TRUST, ET AL
23 - - - - - x
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2 IRVING H. PICARD, TRUSTEE FOR THE
3 LIQUIDATION OF BERNARD L. MADOFF
4 INVESTMENT SECURITIES LLC AND
5 BERNARD L. MADOFF,

6 v. CASE NO. 09-01364-smb

7 ALPHA PRIME FUND LIMITED, ET AL

8 - - - - - x

9 SECURITIES INVESTMENT PROTECTION ADMINISTRATIVE CASE NO.
10 CORPORATION 08-99000-smb

11 - - - - - x

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13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York

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17 APRIL 9, 2014

18 10:04 AM

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21 B E F O R E :

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MICHELLE BROWN

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1 HEARING Matter: Motion to Intervene

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3 HEARING Matter: Motion to Intervene

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5 HEARING Matter: Motion of Defendants Alpha Prime Fund Ltd.
6 and Senator Fund SPC for an order pursuant to Section 105(a)
7 of the Bankruptcy Code and General Order M-390 Authorizing
8 Alternative Dispute Resolution Procedures

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25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Madoff. Go ahead.

3 MR. KIRBY: Good morning, Your Honor. My name is
4 Richard Kirby. I am from K&L Gates. I represent today
5 James Lowery which is a -- who is a defendant in one
6 adversary proceeding and the United Congregation of Nesora
7 (ph), a defendant in another adversary proceeding, and I am
8 speaking on behalf of the defense group that has filed a
9 motion to intervene to address issues of trustee standing in
10 the pending motions to dismiss.

11 I would like to try to categorize the -- how this
12 issue arises in the various cases that are -- adversary
13 proceedings that are pending. One group, there are three
14 groups, and you can describe -- categorize them in three
15 categories.

16 One group is a group that has filed answers and
17 raised the issue of trustee standing. The second group is a
18 group that has not yet filed answers. Their answers are due
19 later this month, and intend to raise the issue of trustee
20 standing.

21 And the third group are parties that have filed
22 pending motions to dismiss, but have not raised the issue of
23 standing. And if they are -- do not prevail on the motion
24 to dismiss, they intend to raise the issue as part of their
25 defense. All parties are of the view that the issue of

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1 trustee standing is not, at this time, ripe.

2 THE COURT: So why are you moving to intervene if
3 it's not ripe?

4 MR. KIRBY: It's not ripe for the Court to decide
5 now, but --

6 THE COURT: So why are you making the motion? Why
7 don't you make it when it's ripe?

8 MR. KIRBY: We're making a motion because we
9 believe that the issue of the -- the legal issues that are
10 raised in other pending motions to dismiss are -- raise
11 issues that and address the statute in a way different than
12 the way we read the statute. And we believe it's important
13 for the Court to hear those views now at the time it decides
14 -- it's backing up for how -- why we are here today, and why
15 we're here now.

16 I appeared before Your Honor on the 14th of
17 February where we raised the issue of the need to be heard
18 at an opportune time in other pending proceedings or where
19 there were legal issues that were -- had a common issue of
20 law and fact to the various adversary proceedings.

21 At that time, we were hampered because we did not
22 know what the various adversary proceedings raised, because
23 there are more than a thousand on the docket, and it was
24 virtually impossible for us unless somebody filed a motion
25 in the master document, for us to track who was raising what

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1 issue at what time.

2 THE COURT: But the issue that you wanted to raise
3 was raised by Ms. Chatman's clients. I went back and read
4 the brief yesterday, it was right there.

5 MR. KIRBY: And it's also been raised by the
6 Schiff parties, and those are the two parties that we have
7 sought to intervene. And the reason is, is because it
8 raises an issue of common -- a common issue of law, in fact.
9 And because we believe it is appropriate for the Court to
10 hear our views on how the statute should be interpreted now
11 before the Court proceeds to adjudicate those issues.

12 THE COURT: But if you're raising different
13 arguments, let's assume I ruled against the Chatman motions,
14 you're raising different arguments, couldn't you just raise
15 them at that point and say, I didn't consider that?

16 MR. KIRBY: Well, obviously if that's the --
17 that's the Court's decision, yes, then we will. But we
18 think --

19 THE COURT: Because otherwise we get back into
20 that situation where I can't decide a single thing until,
21 you know, I get a thousand briefs on the issue.

22 MR. KIRBY: But the way the Court has now placed
23 it in a procedural posture where the various motions to
24 dismiss have been consolidated, this is -- what we have
25 given you is an opportunity to hear our views before the --

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1 you make any decisions on the substantive issue.

2 THE COURT: Can I ask you a question, why you just
3 don't make a motion to dismiss in your own cases?

4 MR. KIRBY: Because we don't believe it's ripe at
5 this time. It raises issues of fact that we need discovery
6 on.

7 THE COURT: Well, I wouldn't decide issues of fact
8 on a motion to dismiss a complaint anyway. The complaint
9 pleads that the trustee -- that the estate is insolvent.
10 And why would I look beyond that on a motion to dismiss?

11 MR. KIRBY: I would think you wouldn't.

12 THE COURT: I guess I don't understand what you --

13 MR. KIRBY: But the reason why we believe it's
14 appropriate to be heard now is because what the trustee
15 argues is that that is the way the statute is to be
16 interpreted, that that's the end of the inquiry at the
17 pleading stage. And we don't think that's the way the
18 statute is properly read, and -- as we've identified in our
19 papers.

20 THE COURT: Suppose you're right, don't I still
21 have to deny the motion to dismiss because the trustee has
22 plead that the estate is insolvent, and I'd have to get --
23 receive extrinsic evidence in order to decide that at this
24 particular moment it's not insolvent?

25 MR. KIRBY: Oh, I would think that that would be

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1 the appropriate resolution of the motions to dismiss.

2 THE COURT: So why decide a legal issue that I may
3 never have to decide? I mean, there's a legal issue at what
4 point do you test insolvency for lack of a better word, or
5 insufficiency.

6 MR. KIRBY: Right.

7 THE COURT: But one of the arguments I think I
8 read was that I may never have to make that determination.

9 MR. KIRBY: It's possible if the case is settled,
10 you will never have to.

11 THE COURT: Well, but why not decide that a trial
12 at which it's raised?

13 MR. KIRBY: Certainly that is what our intent is.
14 What we will undoubtedly be asking the Court at some point
15 is that's a common issue for many cases, and it will need to
16 be consolidated at some point because it makes -- you know,
17 the trustee's specter that we don't need to have a thousand
18 trials on that issue, it doesn't make a lot of sense.

19 It is an issue that transcends all the cases, and
20 it is an issue that is the kind of issue that would seem to
21 be an issue appropriate for consolidation at some point.
22 And so that is the key point that we are raising. And
23 that's what we are trying to do is to make sure that we get
24 heard in the appropriate time on the substance of the legal
25 issues.

1 And I think, you know, it is our view that the
2 procedural remedy for that is to seek to intervene as a
3 matter of permission, which we've sought to do in these
4 proceedings, to be heard on a common issue of law or fact.

5 If --

6 THE COURT: I guess what I'm struggling with is on
7 the one hand, you're telling me it's not ripe, but on the
8 other hand, you're saying you've got to intervene to protect
9 your interests. I just don't understand that. That seems
10 to be inconsistent.

11 MR. KIRBY: Well, Your Honor, because it raises an
12 issue of statutory interpretation, we wanted to bring to
13 Your Honor's attention our view of the statute, which is
14 very different from the statute -- the view of the statute
15 that the trustee raises and -- on the merits. We wanted to
16 bring Your Honor's the fact that the trustee relies on a
17 case which we believe is inappropriately decided for a
18 number of reasons, which we set forth in our papers.

19 And we want to give Your Honor the opportunity to
20 consider those before it rules. And so we felt that the
21 appropriate way to proceed was to proceed as -- to
22 intervene, and as you note in our papers, we alternatively
23 to enter -- to receive our briefs as amicus curiae for the
24 purpose of advising the Court of our views, because this is
25 an issue that we believe will raised throughout these

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1 proceedings by many parties.

2 And we think that the Court is benefitted by
3 having -- and knowing our views at the outset of the case on
4 this important question.

5 THE COURT: Okay.

6 MR. KIRBY: Thank you.

7 THE COURT: Before you sit down, I see Mr. Levy
8 sitting there, and I'm not going to ask him to stand up, but
9 I know that he, on behalf of other clients, made a motion to
10 dismiss but never raised this issue. If it's such an
11 important issue why didn't you raise it, and why do you have
12 to raise it now?

13 MR. LEVY: I will stand, Your Honor.

14 THE COURT: Okay.

15 MR. LEVY: Good morning, Richard Levy of Pryor
16 Cashman.

17 It was not an issue that we had identified as a
18 matter to move on at the time we made our original motions.
19 As Your Honor knows as a matter of jurisdiction, that
20 standing is an element of jurisdiction. It's a matter
21 that's never waived. It's only a question of when do you
22 raise it.

23 THE COURT: Actually, I have a question, is it
24 standing, or just an element of the cause of action?

25 MR. LEVY: I think it's standing, Your Honor. I

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1 think the statute is granting the trustee a remedy which
2 only in certain circumstances, there's no justiciable
3 controversy without standing.

4 THE COURT: Well, you have standing under other
5 provisions of the statute, which give the standings of a
6 Chapter 7 trustee.

7 MR. LEVY: Limited, Your Honor, to the avoidance
8 of transfers to the extent avoidable under the Bankruptcy
9 Code, and limited by SIPA to the extent that there is a
10 shortfall between the amount of claims and the amount of
11 assets available to recover.

12 THE COURT: I know what the statute says, I'm just
13 questioning whether it's an element of the claim or whether
14 it goes to standing.

15 MR. LEVY: I -- Your Honor, I can see it as a
16 hybrid, but I think one way or another, it goes to the
17 question of whether there's a controversy that Your Honor
18 can and should determine.

19 THE COURT: All right. Just a moment.

20 MR. CREMONA: Good morning, Your Honor, Nick
21 Cremona of Baker and Hostetler on behalf -- appearing on
22 behalf of the Trustee.

23 Just to focus on a couple of things that my
24 colleagues just said. I agree with Your Honor that the
25 argument that the movants are -- generally need to intervene

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1 on this issue is internally inconsistent with the relief
2 that they want, which is to defer the determination until
3 some point in the future.

4 There doesn't seem to be an urgency based on that,
5 and that would be inconsistent with the elements of
6 770.24(b) which that would in and of itself cause delay, and
7 that's one of the points that I would get into later on.

8 And I also think it's relevant just to add on to
9 what my colleague Mr. Levy said, as Your Honor posited, if
10 this is an element rather than a threshold issue of
11 standing, I do believe that a party such as Pryor Cashman
12 that has filed, you know, close to 20 motions to dismiss and
13 never raised the issue, there is the issue that it may be
14 waived.

15 THE COURT: Can you waive a failure to assert --
16 state a claim?

17 MR. CREMONA: I --

18 THE COURT: I'm not sure you can waive that, but.

19 MR. CREMONA: Well, I would -- I think they've
20 asserted that it's a defense that they want to maintain, if
21 they didn't assert that defense in these multiple motions to
22 dismiss, I would argue that it's waived.

23 THE COURT: Well, it's certainly not waived if
24 it's subject matter jurisdiction.

25 MR. CREMONA: I agree, Your Honor.

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1 Your Honor, we think that the motion should be
2 dismissed for three reasons. We think it's procedurally
3 improper. The -- and we didn't hear from the movants, as to
4 whether they can satisfy the standards under Rule 7024, we
5 certainly didn't hear that their interests are otherwise
6 adequately represented by the 138 other motions that raise
7 the issue.

8 THE COURT: Well, I've seen that requirement under
9 24(a), which is mandatory, or intervention as a right, is
10 that also -- and the case, the Butler case --

11 MR. CREMONA: That's correct.

12 THE COURT: -- is a 24(a) case. Is that also the
13 standard under 24(b)?

14 MR. CREMONA: It is actually, Your Honor. I think
15 one of the cases that, or in the movant's brief, which is
16 Citizens for an Orderly Energy Policy, 101 FRD 497, actually
17 says that inadequacy of representation is a factor that
18 requires consideration.

19 And several courts have acknowledged that. And I
20 think these parties were here before Your Honor on February
21 14th, and Your Honor specifically asked the question as to
22 why their interests weren't adequately represented in the
23 138 other motions that raised it, and there was no
24 articulated basis on that date.

25 Then we saw the movants' initial motion, which

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1 articulated no basis as to that, and the reply papers
2 articulated no basis, other than that they would say it
3 differently. And I submit to Your Honor that that's
4 precisely why we object to this motion, because in a complex
5 litigation such as this, issues will arise at every turn,
6 and the standard simply can't be, I would say it
7 differently, so therefore I need to be heard on the matter.

8 And frankly, Your Honor, we oppose the motion
9 because we seize upon the same mantra that Your Honor has
10 noticed, this case cannot proceed at the rate of this lowest
11 respondent or with no faster than the slowest case. And
12 that's -- I think this motion is absolutely a microcosm of
13 that mantra by this defense group.

14 THE COURT: Well, but both sides have fully
15 briefed the issue at this point, so --

16 MR. CREMONA: Well --

17 THE COURT: -- in connection, for example,
18 deciding the Chatman motion, why couldn't I just consider
19 their arguments. The Chatman motion raises the same issue.

20 MR. CREMONA: I agree, Your Honor, but I think --

21 THE COURT: It doesn't quite have the parsing of
22 the language that this one does.

23 MR. CREMONA: Well, on that basis, Your Honor, I
24 would submit that there are no new issues raised, and their
25 interests are adequately represented, and therefore, they

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1 don't need to be heard on the issue.

2 But I would like to point out, I think that there
3 is a procedural problem with this motion, in that, I think
4 it's an abuse of Rule 12. As Your Honor indicated, there
5 are two categories of people involved in this motion, those
6 that answered already, and those that moved to dismiss.

7 Those that answered are now seeking what is
8 tantamount to arguing on a motion to dismiss in two
9 different omnibus proceedings involving 239 motions. I
10 would submit that's inappropriate.

11 The second group are those defendants represented
12 by Pryor Cashman and S&R Denton, and there are close to 30
13 motions to dismiss filed by those folks. And those people,
14 as Your Honor already identified, didn't raise this issue.
15 And it's important to note, those parties have been actively
16 litigating in these cases from back in April of 2011, when
17 this issue was first raised and was live before the district
18 court on motions to withdraw the reference.

19 Then these parties, Pryor Cashman and S&R Denton
20 specifically were party to the Griff (ph) proceeding before
21 Judge Rakoff back in I believe it was 2012. Those motions
22 to dismiss were denied. Then those cases were sent, about
23 78 cases were sent back to Your Honor, and motions to
24 dismiss again were filed by Pryor Cashman and S&R Denton,
25 approximately 30 or so back in March of 2013.

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1 And yet again, in January of this year, multiple
2 additional motions to dismiss were filed by those same
3 firms. Now, at this late stage, I think it's inappropriate
4 for them to now raise this argument on what is tantamount to
5 yet another motion to dismiss.

6 So I think that's one reason why it's procedurally
7 deficient. A second reason, Your Honor, which I think is
8 more problematic and more indicative of this litigation
9 strategy that we've seen here is that this latest motion was
10 filed, you know, this group speaks of no delay, but the
11 latest motion was filed after the omnibus briefing on Ms.
12 Chatman's motions was fully completed. Then it was filed on
13 the date that all other motions, the 113, which is now 111
14 motions to dismiss, they were all -- all those parties were
15 required to file their reply on that date.

16 And these parties that were not party to that
17 proceeding filed a motion to -- filed this motion and
18 attached the substantive argument -- substantive memo of law
19 as a reply to the trustee's opposition. Then by order of
20 Your Honor on I believe March 20 that set a briefing
21 schedule on this motion, we filed our opposition on the
22 28th.

23 And then on the 4th, these parties had the
24 opportunity to file a reply, but not only did they file a
25 reply, they attached what I would say is tantamount to a

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1 sur-reply memorandum, which no other party in the 111 cases
2 had the ability to do. And to my knowledge, there was no
3 leave of Court, so -- and that's contrary to the rules of
4 this Court, and contrary to Your Honor's order.

5 And I think those procedural defects alone are
6 reason to deny the motion. But I think there are additional
7 problems. I think as I mentioned, there was delay here, I
8 mean the parties speak of no delay based on -- because they
9 slapped these motions -- they slapped these pleadings on the
10 back of this motion, but there is delay.

11 When we first appeared before Your Honor on
12 February 14th, we had previously scheduled argument on the
13 128 motions on March 12th. And that got delayed. And then
14 we filed timely as Your Honor directed us to do so, all of
15 our replies, our omnibus opposition by March 17th. And now,
16 those two proceedings which were moving apace are now being
17 delayed by this motion.

18 I think that is a prejudice to the trustee. And
19 given the amount of litigation that's transpired over the
20 last three years, to file that at this late stage is another
21 reason to deny it.

22 And I also would -- as I think I already
23 indicated, Your Honor, there has been no articulated basis
24 for their interest not being adequately represented by 138
25 other motions to dismiss that raise the identical issue as

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1 Your Honor pointed out. No -- you know, no new arguments
2 are made here.

3 And as Your Honor indicated, issues are going to
4 arise in this complex case. And under their theory, nothing
5 could ever be decided ever until the last person shows up
6 with their reply. This case simply cannot proceed in that
7 way. I mean, we are five years in, and the victims of this
8 case are not receiving their net losses because we can't
9 move these cases.

10 And I think the last piece I would argue, Your
11 Honor, is that the motion is untimely. And it's untimely I
12 think for one of the reasons Your Honor noted. First of
13 all, this issue has been live since 2011. But secondly,
14 this issue was raised by Helen Chatman's motions, 128
15 motions were filed in November. And I think as Your Honor
16 noted, the parties should have been on notice at that point
17 in time which was November 1.

18 Then Your Honor convened a conference, we were in
19 February -- on February 14th. Your Honor specifically
20 raised the issue of intervention, specifically asked the
21 parties to demonstrate why they are not adequately
22 represented, and did we see a motion at that point? No.

23 We didn't see a motion until three and a half
24 months or excuse me, it's three and a half months after
25 November, but you know, a month or so after Your Honor asked

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1 that question and conveniently after the matters were fully
2 briefed by all parties and the trustee had already submitted
3 his pleadings.

4 So again, I think that allowing the motion is
5 problematic for a number of reasons. It would not promote
6 judicial efficiency in this regard because all it would do,
7 in my view, Your Honor, I would submit, would be to invite
8 additional similar motions at every turn in this case.
9 Whenever an issue comes up, and someone says, I would argue
10 it better, I have something different to say, and these
11 cases will never be able to proceed under those
12 circumstances, Your Honor. And for those reasons, I
13 respectfully request that the motion be denied.

14 THE COURT: Thank you.

15 MS. ATTARD: May I? Just briefly, Your Honor,
16 Lauren Attard for the Securities Investor Protection
17 Corporation.

18 I just want to state on the record that SIPC's
19 supports the trustee. I believe Mr. Cremona has more than
20 adequately represented the position, and if Your Honor has
21 any questions, I'm more than happy to take them.

22 THE COURT: No, thank you very much.

23 MS. ATTARD: Thank you.

24 MR. KIRBY: Your Honor, I'd like to address two
25 points. One, the adequacy of representation issue.

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1 Your Honor, as you know, and as you pointed out,
2 Rule 24(b) does not have --

3 THE COURT: I raised the question, I didn't --

4 MR. KIRBY: No, I understand, but --

5 THE COURT: Okay.

6 MR. KIRBY: -- if you read it, if you read the
7 rule it doesn't happen. Okay. A case is -- and we cite the
8 cases in our papers. There are some cases that have looked
9 at that issue as I guess the simplest way to put it is a
10 guide as to determine whether there's prejudice.

11 But what the Supreme Court case, the leading
12 Supreme Court case that we cite in our papers on the issue
13 of adequacy of representation, it says -- addresses that
14 it's a -- is a minimal issue to look at. And if the parties
15 are addressing -- the case law would seem to suggest that if
16 the parties are addressing the issue differently and raising
17 a different issue, the case I'm referring to --

18 THE COURT: Well, it's not a different issue.

19 MR. KIRBY: But are raising the issue in a
20 different way, then that means that they're not being -- our
21 interests are not going to be --

22 THE COURT: I thought Ms. Chatman did say, if you
23 had to determine the -- I guess the insufficiency -- you
24 couldn't collect if there was an insufficiency. That's the
25 same issue you're raising. She just didn't go through the

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1 statute the way you did.

2 MR. KIRBY: Well, that's why it's so important,
3 because that's why we felt we had to --

4 THE COURT: But then Mr. Cremona comes in and
5 says, but, you know, somebody else will pipe up and say,
6 hey, I just thought of another argument on the same issue,
7 and nobody's really made it this way, so now I want to
8 intervene. When does this stop?

9 MR. KIRBY: I understand the issue that -- the
10 dilemma that the trustee raises. But we think that the
11 Court benefits from having at the earliest opportunity that
12 we can present it, an airing of the views of the parties
13 that are -- will have -- they will have to raise at a future
14 point. But the Court benefits from having our views set
15 forth at the earliest possible time. And that is the reason
16 why that we have asked that -- we felt that the need to
17 intervene at this time.

18 On the issue of timeliness, Your Honor, until the
19 trustee files his omnibus response, we don't -- I mean, we
20 have seen various responses in various papers where the
21 trustee continues to advocate the Bevelbreast (ph) decision
22 controls.

23 THE COURT: Also Judge Rakoff cited that decision.

24 MR. KIRBY: Well, but he decided -- he doesn't
25 address the merits.

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1 THE COURT: But you knew this was an issue when
2 the case, some parties sought withdrawal of the reference on
3 that basis. This has been an issue that's been bouncing
4 around in this case since -- I don't go that far back in it,
5 but -- I'm told 2011, so I have to assume that's correct.

6 MR. KIRBY: Well, Your Honor, it has been our view
7 that the issue, because it -- the statute is focused on the
8 time of recovery, it's not an appropriate issue for a motion
9 to dismiss.

10 THE COURT: Do you agree that the trustee can
11 bring an avoidance action now that the statute recognizes
12 the difference between avoidance and recovery?

13 MR. KIRBY: Yes.

14 THE COURT: Okay. So this has nothing to do with
15 the avoidance action?

16 MR. KIRBY: I -- it -- we do not -- I mean, we do
17 not contest it, the trustee by pleading that there is a --
18 to use Your Honor's words, an insolvency or an
19 insufficiency, that that is adequate for pleading purposes.

20 THE COURT: I'm --

21 MR. KIRBY: It's an issue of proof.

22 THE COURT: Yeah, no. I'm saying something
23 different. There's a difference between an action to avoid
24 a transfer --

25 MR. KIRBY: Yes.

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1 THE COURT: -- and to recover that avoidable
2 transfer.

3 MR. KIRBY: Correct.

4 THE COURT: Are you arguing that regardless of
5 what the statute means, that it has any bearing on the
6 trustee's right to bring an avoidance action?

7 MR. KIRBY: Well, it does, that statute does, but
8 on a different point.

9 THE COURT: But it only talks about recovery, it
10 doesn't talk about avoidance.

11 MR. KIRBY: Yes, but it does -- the last sentence
12 of that provision which then says, that for the purposes of
13 these actions, the property is deemed to be property of the
14 debtor.

15 THE COURT: But that's to give the trustee
16 standing so --

17 MR. KIRBY: That's --

18 THE COURT: -- people can't argue that it's not
19 property of the estate that was transferred, that's all.

20 MR. KIRBY: Right. But what really drives is that
21 the trustee's avoidance power on a SIPA proceeding is
22 limited by 8(c)(3). In other words, he can only proceed on
23 8(c)(3) of the statute.

24 But, yes, it is my view that if the trustee, if I
25 were in the trustee's -- the trustee's counsel, as long as

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1 you plead it, that's sufficient for purposes of commencing
2 the avoiding action, that's why we chose not to file a
3 motion to dismiss on the issue.

4 Also, it's not an issue that we viewed as
5 appropriate for withdrawal of reference, we did not raise
6 it. But at this point, where -- you know, where the Court
7 is about to decide the issue on its merits, we thought that
8 it was appropriate for the Court to hear our views.

9 THE COURT: Let me ask you a hypothetical
10 question.

11 MR. KIRBY: Pardon?

12 THE COURT: A hypothetical question.

13 MR. KIRBY: Yes, sir.

14 THE COURT: Suppose that the transfer was simply a
15 mortgage, and all the trustee had to do was avoid the
16 mortgage, didn't have to recover anything. Would the
17 statute that you're discussing have any bearing on that type
18 of a case?

19 MR. KIRBY: No, because the statute addresses
20 customer property. And so it's aimed at recovering customer
21 property. And I -- on the hypothetical that you raised, the
22 mortgage would not be customer property. Maybe the facts
23 could turn out that it was customer property, but I can't
24 concede with that on a mortgage.

25 THE COURT: All right. Thank you. I reserve

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1 decision.

2 MR. KIRBY: Thank you.

3 MR. CREMONA: Thank you, Your Honor.

4 THE COURT: You're welcome. The timing is
5 perfect, it's 10:30, we are up to the next case. Mr. Duffy?

6 (Pause)

7 THE COURT: Go ahead.

8 MR. DUFFY: Good morning, Your Honor.

9 THE COURT: Do you have his appearance?

10 Okay. Go ahead.

11 MR. DUFFY: Good morning, Your Honor, Todd Duffy,
12 Duffy Amedeo LLP for Alpha Prime Fund Limited and Senator
13 Fund PC.

14 Your Honor, after almost five years of litigation,
15 Alpha Prime and Senator Fund are here requesting that a
16 mediator, that the parties be compelled to go to mediation.

17 For the last year or so, we tried to settle these
18 things without a mediator, and some issues came up, but we
19 feel with a third party mediator we can get past those
20 issues and possibly resolve at least our section of the
21 adversary.

22 THE COURT: Have you made an offer to the trustee?

23 MR. DUFFY: Yes, Your Honor. Yes, in fact, the
24 entire settlement process began because we wrote them a
25 letter detailing our offer and the settlement amount.

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1 THE COURT: Did the trustee make a counter offer?

2 MR. DUFFY: No, Your Honor. The trustee requested
3 quite a bit of documents, we gave -- we handed over the
4 documents we received from our client, and offered to make
5 our shareholders and directors available for interview and
6 for deposition.

7 The case really has had no movement, and we'd like
8 to see some sort of a resolution here, Your Honor, so that
9 our clients could actually get their money back, if
10 possible. So for these reasons, we'd ask that the Court
11 grant our motion, grant the relief.

12 THE COURT: Thank you.

13 MR. WASHAVSKY: Good morning, Your Honor, Oren
14 Warshavsky, Baker Hostetler for the trustee.

15 Your Honor, I agree with Mr. Duffy that the case
16 has lasted for five years. Obviously, that's clear. This
17 action -- this adversary proceeding has lasted for three
18 years. We have indeed had negotiations on and off for four
19 years.

20 The key issue here is the issue of good faith or
21 lack thereof. One of the main issues, and whether it goes
22 to the avoidance action or to the allowance of a customer
23 claim turns on the issue of good faith.

24 In the discussions with Mr. Duffy, I don't want to
25 get too deeply into Rule 408, and I feel myself somewhat

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1 constrained, but we certainly had discussions about what
2 could adequately -- what facts could bear upon good faith.

3 The reason we had that discussion is because
4 ultimately when you have a settlement, whether it's with a
5 mediator or between the parties, you can't ignore the
6 fundamental position of the parties, and that's the
7 breakdown that we had here. And that's -- and our concern
8 when mediation arose, or when Mr. Duffy raised this issue,
9 is the parties fundamentally disagree on the law, and on the
10 underlying facts.

11 And to be clear, the trustee has other cases,
12 there are defendants in this action where the trustee is
13 going to mediation, and there are other feeder funds in the
14 HSBC action that we've agreed to try and mediate the dispute
15 because we understand the parties had to find, at the very
16 least, what the governing law is, and how the facts will
17 affect the law. Here, we don't see eye to eye.

18 What we've said to Mr. Duffy is that we think his
19 clients have acted in bad faith period, and that if he wants
20 us to really consider coming off of our position, how to
21 compromise, how to have a meaningful discussion, whether
22 with him or with a mediator, we need to know what facts
23 underlie his defense. Otherwise we can -- there's no way to
24 analyze any risk to the parties' positions.

25 Now, Mr. Duffy talked about in his reply brief,

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1 and then he spoke a little about discovery, we'd be more
2 than happy -- just say, if Mr. Duffy feels that there is an
3 issue with the pace of the case, we'd be more than happy to
4 get started with discovery. We'd be more than happy to
5 actually sit down, lay out a discovery schedule, and pick a
6 point for mediation and come back and say -- and discuss
7 whether or not mediation will be fruitful.

8 But so far, because issues have been before Judge
9 Rakoff, we've been unable to raise the case. We didn't ask
10 Senator and Alpha Prime to withdraw the reference. They're
11 the lead brief on one of the issues. They filed a
12 supplemental brief on the same issue. They'd like to ignore
13 that, if they'd like to move forward on this case, and move
14 forward with discovery, we'd be more than happy to lay out a
15 schedule with them, and revisit, once we feel that there's
16 been some discovery and we understand --

17 THE COURT: But my sense from the papers is
18 there's a dispute as to whether the discovery is adequate.
19 So why can't a mediator just deal with that, in addition to
20 the mediation of a possible settlement?

21 MR. WASHAVSKY: What discovery, Your Honor, we
22 haven't been allowed to serve discovery? What we have --

23 THE COURT: The discovery you contend you need in
24 order to make a counter proposal, I guess.

25 MR. WASHAVSKY: Well, I think it's actually the

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1 discovery that we would need to understand Mr. Duffy's
2 complaint. What we've gotten frankly is -- not his
3 complaint, I'm sorry, his allegations. We've gotten our
4 conclusory statements, right, we have -- we do not have any
5 evidence that we have pulled through 2004 from third
6 parties, contradicts their position.

7 And my concern with a mediation, and this is where
8 we started when before the motion was even made, is that
9 we're going to go -- mediation is going to lead us nowhere.
10 We're going to be back here and be accused of bad faith
11 mediation.

12 If we -- and I'm happy to have a master or the
13 trustee I should say, is happy to have a master or a
14 mediator go through discovery --

15 THE COURT: Well, I can't appoint a master.

16 MR. WASHAVSKY: Oh, yeah, okay, sorry. A mediator
17 for discovery purposes, to help us go -- and let us go
18 through with full discovery. The problem with informal
19 discovery, Your Honor, is that there's nothing to tie the
20 other side to produce, right. We can't come to Your Honor
21 and say, oh, gee, Your Honor, we know that they haven't
22 given a thorough production.

23 THE COURT: No, but you can come back and say, or
24 somebody could say, the mediation is unsuccessful for
25 whatever reason, and then we proceed with the case.

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1 MR. WASHAVSKY: Then we're going to have that in
2 every case. We're going to be stuck in every case where a
3 party doesn't want to disclose information, wants to take a
4 position we're going to have -- it's going to be like the
5 motions to withdraw the reference.

6 THE COURT: What are you doing in the cases that
7 are subject to mandatory mediation? Are you proceeding with
8 mediation and discovery?

9 MR. WASHAVSKY: No, those cases, there's no
10 contested issue of facts. The cases where there's mandatory
11 mediation, and I think we have about 50 of those right
12 now --

13 THE COURT: Are those the feeder fund or the --

14 MR. WASHAVSKY: No, those are --

15 THE COURT: -- bad faith, so-called bad faith
16 cases?

17 MR. WASHAVSKY: -- the innocent investors. These
18 are the feeder fund cases where there are disputes about
19 issues of fact. And again, I don't want it to sound like
20 we're taking --

21 THE COURT: Well, what are you doing in the other
22 -- with the other defendants in this adversary proceeding
23 where you are going through mediation?

24 MR. WASHAVSKY: Well then we've agreed to the
25 facts. We've agreed on the issues about -- again, I don't

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1 want to -- I feel very confined by confidential settlement
2 discussions, but what I'll say is, we agree as to what the
3 facts show, and what the legal implications are, so that if
4 the trustee is -- the other side would agree with us as to
5 how we interpret certain evidence, whether it's to show bad
6 faith or a lack of good faith, and what that would mean in
7 term of the trustee's claim. And then we -- each side can
8 then actually discuss what the risk is, what's the risk of
9 -- what's the chance of success, what's the risk of loss?
10 Here, we cannot have that discussion, and that's the
11 fundamental problems that we're going to come back here.

12 We're going to spend time and money in mediation,
13 and we're not going to get back. If what Mr. Duffy wants is
14 to push --

15 THE COURT: It sounds like you've made up your
16 mind already.

17 MR. WASHAVSKY: Well, I don't know how counsel,
18 with all -- you know, honestly, Your Honor, I don't know how
19 to counsel a client when we have one set of facts, and the
20 other side contradicts, and we have nothing but attorney
21 Palavor (ph) to say to us, no, no, no, you're wrong, how can
22 I tell my client to settle it. You're right, in that
23 regard, we have. Until there's discovery, I don't know how
24 we could come off of our position. I don't know how to
25 counsel a client that way.

1 And again, we're happy to move forward, happy to
2 move forward with discovery. We think that would push the
3 case along and satisfy Mr. Duffy's request here.

4 THE COURT: Uh-huh.

5 MR. WASHAVSKY: And we'd be happy to revisit the
6 issue once we actually can have discovery. And if there's a
7 dispute, bring it to Your Honor and say here's the problem
8 that we have in discovery.

9 I can tell that I haven't really satisfied, Your
10 Honor, but I --

11 THE COURT: No, all you've told me is you have
12 disputes on the facts and the law which is true in every
13 case.

14 MR. WASHAVSKY: Well, I don't -- well, Your
15 Honor --

16 THE COURT: And at the risk of sounding glib, it
17 sounds to me like the case needs adult supervision. I think
18 you need a grown-up to tell you, you do need discovery, or
19 you don't need discovery, or you turn it over, if you don't
20 turn it over, you're mediating in bad faith, that's what it
21 sounds like to me.

22 MR. WASHAVSKY: I don't know how a mediator -- I don't
23 know when their -- if Your Honor could -- I don't know how
24 to convince Your Honor to the contrary. I've read through
25 the papers where I understand Your Honor's concern in that

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1 regard. I would tell you from the trustee's position our
2 concern is, there's nothing to hold the -- without
3 discovery, and without Court ordered, you know, true
4 discovery under the federal rules, there's nothing to tie
5 the other side to production.

6 THE COURT: The mediation may not be successful,
7 and nobody says you have to settle, but it doesn't mean you
8 shouldn't try. I mean, you had mandatory mediation in every
9 case that was filed after I think November -- it was
10 November 2008 or 2010.

11 MR. DUFFY: 2010, Your Honor.

12 THE COURT: And this would've been subject to
13 mandatory mediation, but for the fact it was filed in July
14 2009. I don't understand your resistance. I mean,
15 obviously there's a lot that's gone on between the
16 parties --

17 MR. WASHAVSKY: Right.

18 THE COURT: -- that I'm not privy to, and that's
19 why maybe it's just a better idea to have a person in the
20 room who's a neutral, and a neutral evaluator, who can say
21 you're never going to settle the case if you don't give up
22 this information, or you don't need this information to make
23 a decision or the parties are so far apart that, you know,
24 you might as well just go to trial.

25 MR. WASHAVSKY: I don't disagree with any of --

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1 obviously what Your Honor said, it's all very reasonable,
2 but --

3 THE COURT: Okay. We're in agreement then.

4 MR. WASHAVSKY: -- the problem is that we haven't
5 had discovery in the case.

6 THE COURT: Well, if you --

7 MR. WASHAVSKY: And there's nothing to tie the
8 other side. How do I complain to a mediator when I can't
9 force --

10 THE COURT: This is a common circular.

11 MR. WASHAVSKY: Yeah.

12 THE COURT: You say to the mediator, we can't
13 discuss settlement or mediation unless we get this
14 information.

15 MR. WASHAVSKY: But, Your Honor, I'm not even
16 allowed to serve discovery. I'm not allowed to follow up
17 yet. We haven't had the case conference, the case is --

18 THE COURT: Well, if you need the information and
19 you can't get it, and you convince the mediator that you
20 really need it for mediation, that's the end of the
21 mediation. And maybe they've mediated in bad faith.

22 MR. WASHAVSKY: What's the procedural vehicle that
23 allows me to serve discovery?

24 THE COURT: All right. Is there anything else?

25 MR. WASHAVSKY: There's not, Your Honor, I --

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1 THE COURT: This question and answer session is
2 not getting us anywhere.

3 MR. WASHAVSKY: Okay. Thank you, Your Honor.

4 THE COURT: All right. I'm going to grant the
5 motion. It -- as I said there is a history in this case, or
6 a history between the parties that I think it's best for a
7 mediator to try and work out, and to cut through the
8 animosity, cut out -- cut through the discovery disputes and
9 see if there's a possibility of settlement. It doesn't mean
10 you have to settle. It doesn't mean that the case can be
11 settled, but it seems to me that there's no downside to
12 having a mediator try it, in a case which is entirely built
13 around, not just this case, but a procedure that's entirely
14 built around mandatory mediation.

15 Your proposed order didn't identify how you're
16 supposed to select a mediator.

17 MR. DUFFY: No, Your Honor, we could --

18 THE COURT: Do you think you could sit in the same
19 room and talk about that, or do you want me to just appoint
20 a mediator?

21 Why don't you let me know. I'll give you seven
22 days to follow the same procedure, as the rule, if you
23 haven't agreed on a mediator in seven days, write me a
24 letter. And you can submit your proposed mediation order.
25 Do you have any comments on their order?

1 MR. WASHAVSKY: No, Your Honor, I think it had --
2 I'd have to take a look, Your Honor, I think --

3 THE COURT: All right. Why don't you do this.

4 MR. WASHAVSKY: -- I can respond them.

5 THE COURT: Why don't you settle a proposed order
6 directing mediation, giving the parties seven days to agree
7 on a mediator, you, Mr. Duffy, will tell me if you haven't
8 agreed on a mediator in seven days from the date of the
9 order, and that if you haven't, I'll appoint the mediator,
10 and a back-up mediator, okay?

11 MR. DUFFY: Very well, Your Honor.

12 THE COURT: All right. Thank you.

13 MR. WASHAVSKY: Thank you.

14 (Proceedings concluded at 10:45 AM)

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R U L I N G S

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IDENTIFICATION

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and Senator Fund SPC for an order Authorizing

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Alternative Dispute Resolution Procedures

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CERTIFICATION

2

3 I, Sheila G. Orms, certify that the foregoing is a
4 correct transcript from the official electronic sound
5 recording of the proceedings in the above-entitled matter.

6

7 Date: April 9, 2014

8

9 **Sheilia G. Orms**

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